No. 3723

United States
Circuit Court of Appeals
For the Ninth Circuit

G. H. BACHENBERG,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Plaintiff in Error

M. B. MOORE
Attorney for Plaintiff in Error.

Filed this.....day of....., 1922.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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STATEMENT OF THE CASE

I.

The above named plaintiff in error, G. H. BACHENBERG, on the 9th day of April, 1921, and prior thereto, was conducting a soft drink establishment on the premises on the Corner of Center Street and

Commercial Row, in the City of Reno, Washoe County, Nevada.

On the 9th day of April, 1921, P. Nash, a Federal Prohibition Enforcement Officer for the State and District of Nevada, went before Anna M. Warren, one of the United States Commissioners, for the District of Nevada, for the purpose of securing a search warrant to search the premises and property of the said G. H. Bachenberg, at the Corner of Commercial Row and Center Street, in the said City of Reno, for the purpose of discovering whether or not Bachenberg was violating the Prohibition Law; and the said P. Nash, on said date, made and filed an affidavit, Transcript of Record upon Writ of Error page 11:

"UNITED STATES OF AMERICA,
DISTRICT OF NEVADA,
COUNTY OF WASHOE. } ss.

"On this 9th day of April, 1921, before me, Anna Warren, a United States Commissioner in and for the District of Nevada at Reno, Nevada, personally appeared P. Nash, who being first duly sworn, deposes and says:

"That he is and at all times herein mentioned was a Federal Prohibition Enforcement Agent in and for the District of Nevada and as such makes this affidavit and set forth the facts, circumstances and conditions hereinafter set forth that heretofore came to the knowledge of and were ascertained by affiant for the purpose of having issued hereon and hereunder a search-warrant,

under and pursuant to the provisions of Title II of the Act of Congress approved October 28, 1919, known as the National Prohibition Act, respecting the issuance of search-warrants, to search the following described premises, to-wit: Premises on the corner of Center Street and Commercial Row in the City of Reno, County of Washoe, State of Nevada, known as the Palace Bar, occupied by John Doe Brockenburg.

"That affiant has knowledge and information that in and upon the above-described premises, and since Title II of the said National Prohibition Act went into effect, to-wit: after the first day of February, 1920, that intoxicating liquor containing one-half of one per cent or more of alcohol by volume was and is now being manufactured, sold, kept and stored, possessed and bartered, for and fit for beverage purposes, in violation of the said National Prohibition Act and particularly of Section 21 of Title II of said act.

"That the facts, circumstances and conditions of which affiant has knowledge, and as ascertained by affiant are as follows, to-wit: Direct information to affiant by a certain citizen of Reno, whom affiant has known for a long time and whom affiant believes to be absolutely truthful and reliable that liquor is being sold over the bar at said premises and that said informant purchased a drink there on this date; that affiaint and agent H. P. Brown have watched said premises and on one occasion saw two parties coming away from said premises under the influence of liquor.

"That it will be necessary to search the above described premises in order to secure for the United States the said intoxicating liquor and apparatus and material for the manufacture of

the same, and that it will be impossible to make the said search without the aid and use of a search-warrant, whereupon affiant prays that a search-warrant issue to enter the said premises and there to search for the said intoxicating liquor and apparatus and materials for the manufacture of the same, pursuant to the statute in such case made and provided."

P. NASH.

"Subscribed and sworn to before me this 9th dav of April, 1921.

(SEAL) ANNA M. WARREN,
United States Commissioner."

And on the same date the Commissioner, Anna M. Warren, after the making and filing of said affidavit, issued a search-warrant, which appears in the Transcript of Record Upon Writ of Error, pages 13 and 14:

"The President of the United States of America,
To the United States Supervising Prohibition Enforcement Agent and to His Deputies, or Any or Either of Them: Greetings:

"WHEREAS, P. Nash, has heretofore, towit, on the 9th day of April, 1921, filed with me, Anna M. Warren, a United States Commissioner in and for the District of Nevada, at Reno, Nevada, in which he states that he is a Federal Prohibition Enforcement Agent in and for the District of Nevada, working under the United States Supervising Prohibition Enforcement Agent at San Francisco, California; that in and upon those certain premises situate as fol-

lows, to-wit: Premises on the corner of Center Street and Commercial Row in the City of Reno, County of Washoe, State of Nevada, known as the Palace Bar, occupied by John Doe Brockenburg, that affiant has knowledge and information that in and upon the above described premises there is located and concealed, stored and kept, sold, possessed and bartered and fit for beverage purposes intoxicating liquor containing one-half of one per centum or more alcohol by volume, in violation of the National Prohibition Act and particularly of section 21 of Title II of the said Act.

"That it will be necessary to search the above described premises in order to obtain for the United States Government the said intoxicating liquor, and that it will be impossible to make the above mentioned search without the aid and use of a search-warrant, whereupon affiant prays that a search-warrant issue, covering the above-described premises and each and every building on said premises.

"NOW, THEREFORE, pursuant to Section 25, Title II of the said National Prohibition Act you are hereby authorized and empowered to enter the above-described premises in the daytime or in the night-time and each and every building on said premises and there to search for the above-mentioned intoxicating liquor which is concealed in violation of the National Prohibition Act, and to seize the said liquor and take the same into your possession to the end that the said liquor may be dealt with according to law, and to make due return hereof, with a written inventory of the property seized by you or either of you without delay.

"WITNESS my hand this 9th day of April, 1921.

ANNA M. WARREN,
United States Commissioner."

(ENDORSED)

Reno, Nev., April 10th, '21.

"Make return on within warrant as follows:

"Searched premises described within on April 9th, 7:55 P. M.

"Seized bottle containing liquor from behind bar.

"Arrested proprietor, Geo. H. Bachenberg, who was behind bar at time search was made.

"I, P. Nash, the officer serving the within warrant, hereby certify on oath, that the above inventory represents all the property taken under the warrant."

"P. NASH, Fed. Pro. Agt."

The said officer, P. Nash, in company with H. P. Brown, another Prohibition Enforcement Officer, during the evening of the 9th of April, 1921, proceeded to the premises and raided the same in a forcible manner. While they had the search-warrant in their possession, they did not disclose their purpose, but rushed into the place, leaped over the bar, overpowered Bachenberg, who was behind the bar waiting on customers, and made their search; and sometime thereafter told him they had a search-warrant and gave him a copy of it. The manner in which the raid was made is set out in the affidavit of G. H. Bachenberg, filed in support of a motion to quash the search-warrant in the District Court. See Transcript of Record Upon Writ of Error, page 10:

"STATE OF NEVADA
"COUNTY OF WASHOE,—ss.

"George Bachenburg, being first duly sworn upon his oath deposes and says: That he is the owner and proprietor of a certain business room and house situate at the corner of Center Street and Commercial Row, in the City of Reno, Washoe County, Nevada, and was in possession thereof on the 9th day of April, A. D., 1921, and that on the evening of said date while defendant was on duty behind the counter in said place of business, one P. Nash and H. P. Brown, Federal Prohibition Enforcement officers in a forcible and violent manner entered affiant's place of business, leaping over the counter, seizing affiant and engaging in a struggle with affiant and overpowering him and overcoming him, and that said persons forcibly and unlawfully and without announcing that they were officers or that they were in possession of a search-warrant to search defendant's premises, and without serving any copy of any search-warrant, or other warrant upon defendant, and in an illegal manner searched said premises and seized and took in their possession, one bottle containing liquor, and not until said officers had so forcibly attacked defendant and so forcibly and unlawfully searched said premises and seized said property did the said officers or either of them present to affiant or any other person any search-warrant or other warrant.

"Further affiant saith not."

"GEO. H. BACHENBERG".

Bachenberg was arrested, taken before the Commissioner and a Complaint filed charging him with a violation of the National Prohibition Act. Motion

to Quash the search-warrant was made before the Commissioner, the basis of the motion being that no sufficient or legal affidavit was made or filed by any person before the Commissioner prior to the issuance of the search-warrant, and that no sworn testimony was taken, and that no sufficient facts were presented to the Commissioner under oath, or otherwise, from which the Commissioner could determine that probable cause existed for the issuance of the search-warrant. Transcript of Record upon Writ of Error, page 5.

A Notice of said Motion to Quash, together with a copy thereof, was served upon the United States District Attorney William Woodburn, prior to the hearing of the said Motion. Transcript of Record Upon Writ of Error, page 3.

Thereafter, upon the hearing of said Motion to Quash, the Commissioner denied the same. Bachenberg was bound over to the District Court to await trial, and an indictment charging him with the violation of the Prohibition Act was returned into Court on the 26th day of April, 1921.

Thereafter, and before trial upon the said indictment, the Motion made before the Commissioner to quash the search-warrant, was renewed before the District Court and denied, and an original Motion made for the return of the liquor seized and to quash the search-warrant. Transcript of Record

Upon Writ of Error, bottom of page 7, continued on pages 8 and 9:

"Comes now the defendant above named and moves the Court to return to defendant one bottle containing liquor; said bottle being seized by one P. Nash and H. P. Brown and others unknown to defendant on the 8th day of April, A. D. 1921, and taken from the premises at the corner of Center Street and Commercial Row in the City of Reno, Washoe County, Nevada, which said premises were then and at said time used and occupied by defendant; and also moves the Court to quash that certain search-warrant issued by Anna M. Warren, one of the Commissioners of this court, on or about the 9th day of April, A. D. 1921, upon an affidavit made and filed before said Commissioner by one P. Nash on the 9th day of April, A. D. 1921, for the reason and on the ground that the said search and seizure was made by said persons forcibly and in an unlawful manner, and without the service or notice to defendant that said officers were in possession of a search-warrant; and for the further reason that said search-warrant was illegal and void for the reason that no sufficient or legal affidavit was made or filed by the said P. Nash or any other person before or with the said Commissioner, prior to the issuance of said search-warrant; that no witnesses were examined under oath before said Commissioner and no depositions taken in writing before said Commissioner before the issuance of said search-warrant and that no sufficient facts were presented to the said Commissioner under oath or by affidavit from which the said Commissioner could determine that probable cause existed that an offense was being committed by said defendant or had been committed by said defendant, or that said premises were being used or had been used for unlawful purpose,

or in violation of the National Prohibition Act, and that all of the acts of the said Commissioner and of the said Nash and Brown in the issuance of or in the service of or search of said premises and seizure of said described property was in violation of defendant's constitutional rights as provided under the Fourth Amendment to the Constitution of the United States, and that the retention of said liquors and the intended use thereof at the trial of defendant in the case now pending against him in this court will be in violation of defendant's constitutional rights as provided under the Fifth Amendment to the Constitution of the United States.

"Dated this 29th day of April, A. D. 1921."

"MOORE & McINTOSH,"
"Attorneys for Defendant."

The motion made in the District Court to return the property and to quash the search-warrant was supported by the affidavit of G. H. Bachenberg, supra. Transcript of Record Upon Writ of Error, page 10 supra.

The motion for the return of property and to quash the search-warrant was argued before the court and submitted, and afterwards by the court denied, to which exception was taken. See Transcript of Record Upon Writ of Error, page 18.

The case was called for trial on the 7th day of May, 1921, and after the jury had been impaneled and sworn to try the case, and before the introduction of any testimony, objection was made on behalf

of the defendant to the introduction of any testimony on the part of the Government secured or discovered by means of the search-warrant. See Transcript of Record Upon Writ of Error, page 52:

"Mr. MOORE: If the Court please, at this time I object to the introduction of any testimony on the part of any witness as to what was done and what was found or seized in the premises occupied by this defendant in Reno, and as described in the affidavit and in the search-warrant, which are a part of the records in this case, on the grounds that the evidence, and all the evidence on the part of the Government, was secured by reason of an illegal and unlawful search of the defendant's premises, and of his property; that there was no valid or sufficient affidavit filed with the magistrate, or commissioner who issued the search-warrant in question, or showing that probable cause existed that any crime had been, and was being committed, and that the evidence in the possession of the Government in this case was secured in violation of the constitutional rights of this defendant, as provided in the Fourth Amendment to the Constitution of the United States; and that its admission in testimony here will be in violation of the Fifth Amendment to the Constitution of the United States.

"I base this upon the motion in the case, and the proceedings heretofore had. I understand the Court has ruled on that."

During the examination of the witness, H. P. Brown, called by the Government, objection again was interposed to the same line of testimony. Transcript of Record Upon Writ of Error, page 54:

"Q. What, if anyhting, took place after you went in?

"Mr. MOORE: If the Court please, I do not wish to renew my objection to all these questions, so may it be understood that my objection goes directly now to what took place on the part of this witness, and what he did, and what he found there, so I need not interrupt?

"The COURT: It will be so understood, and you may have an exception."

The objection was made to the testimony of P. Nash, a witness called by the Government, to the same line of testimony. See Transcript of Record Upon Writ of Error, page 63:

"Q. Was anyone in there at that time?

"A. Yes, sir; possibly—I think there must have been twenty or thirty people at least; the lower end of the bar, there were at least—

"Mr. MOORE: Just a moment. If the Court please, in order that I may have my record correct, I object to any testimony on the part of this witness as to what he did or what he saw, basing my objection on the same grounds I have hitherto stated in the objection to the testimony of the other witness, and the general objection to the introduction of any testimony.

"The COURT: It will be the same ruling, and the same exception."

At the close of the testimony of Nash, motion was made to strike the testimony of Nash and Brown

from the record. See Transcript of Record Upon Writ of Error, page 75:

"Mr. MOORE: Now, if the Court please, in order to have my record complete as I view it, I move that the testimony of Mr. Brown and Mr. Nash relative to what occurred in the premises this evening at the time they made the search be stricken from the record, for the reason it now appears that it was secured in an unlawful and illegal manner, basing my motion upon the files and records in this case, and upon the testimony now given by the officers.

"The COURT: The motion is overruled, and you may have an exception."

No testimony was introduced on behalf of the defendants. The Court instructed the jury and a verdict of guilty was returned. Before sentence was passed motion for new trial was made. Transcript of Record Upon Writ of Error page 28:

> "Comes now the defendant above named and moves the Court that a new trial be granted for the following reasons, and on the following grounds, to-wit:
>
> "**1st.** That the Court erred in its decision upon questions of law arising during the course of the trial.
>
> "**2d.** That the verdict of the jury is contrary to law.
>
> "MOORE & McINTOSH"
> "Attorneys for Defendant"

The Motion for New Trial was denied; exception taken. The defendant was sentenced to pay a fine of Five Hundred ($500.00) Dollars and costs, and to stand committed until paid.

Thereupon, a petition for Writ of Error was filed. Transcript of Record Upon Writ of Error, page 44:

"Now comes G. H. Bachenberg, the defendant in the above-entitled cause, and feeling himself aggrieved by the verdict of the jury and the judgment of the District Court of the United States for the District of Nevada, made and entered on the 6th day of June, A. D. 1921, hereby petitions for an order allowing him, said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals of the Ninth Circuit from the District Court of the United States for the District of Nevada, and also prays the Court that a transcript of the record, testimony, exhibits, stipulation, proceedings and papers, duly authenticated, may be prepared and sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that said writ of error may be made a supersedeas and that your petitioner be released on bail in an amount to be fixed by the Judge of said District Court pending the final disposition of said writ of error.

"Assignment of Errors is filed with this petition."

"MOORE & McINTOSH"
"His Attorneys"

Assignment of Errors were made and filed. See Transcript of Record Upon Writ of Error, page 29.

Citation on Writ of Error was issued and served. See Transcript of Record Upon Writ of Error, page 86.

Thereafter, Writ of Error was allowed. Transcript of Record Upon Writ of Error, page 45.

Bail Bond on Writ of Error filed. Transcript of Record Upon Writ of Error, page 46.

Bond on Writ of Error made and filed. Transcript of Record Upon Writ of Error, page 50.

The Assignment of Errors filed are nine in number.

Assignment No. I:

Based upon the denial of Motion for a new trial.

Assignment No. II:

Based upon the objection to the introduction of any testimony.

Assignment No. III:

Based upon the objection to the admission of the testimony of H. P. Brown.

Assignment No. IV:

Based upon the objection to the admission of the testimony of P. Nash.

Assignment No. VI:

Based upon the motion to strike the testimony of Brown and Nash from the record.

Assignment No. VII:

Based upon the objection to the introduction of testimony of S. C. Dinsmore.

Assignment No. VIII:

Based upon the denial made to renew the motion

to quash the search-warrant before the Commissioner.

Assignment No. IX:

Based upon the motion for the return of the property seized and to quash the search-warrant made in the District Court in this case, directly raise the question as to the sufficiency of the affidavit for the search-warrant; and

Assignment No. IX: also raises the question as to the legality of the search under the search-warrant.

Assignment No. V:

Based upon the refusal of the Court to permit counsel for the defendant to inquire of P. Nash, a witness for the Government, as to his actual knowledge of the alleged facts and statements made in the affidavit for the search-warrant, raises the question as to whether or not, during the trial, the defendant counsel may inquire as to the actual knowledge and facts in the possession of the party who makes the affidavit for the search-warrant at the time it is made.

II.

The questions raised by the Assignments of Error Nos. 1, 2, 3, 4, 6, 7 and 9, are all based upon and grow out of the proposition involved in the motion referred to under Assignment No. 9: "That the Court erred in overruling defendant's motion made in the case to quash the search-warrant issued by

Anna M. Warren, United States Commissioner in and for the District of Nevada, on the 9th day of April, 1921, and for the return to the defendant of the property taken under said search-warrant."

The search-warrant referred to in the foregoing Assignment of Error was issued as the result of an affidavit filed before the Commissioner Anna M. Warren, at the time the search-warrant was issued. The facts as alleged are as follows: Transcript of Record Upon Writ of Error, page 11 and 12, excerpt from the affidavit of P. Nash:

"That the facts, circumstances and conditions of which affiant has knowledge and as ascertained by affiant are as follows, to-wit: Direct information to affiant by a certain citizen of Reno, whom affiant has known for a long time and whom affiant believes to be absolutely truthful and reliable that liquor is being sold over the bar at said premises and that said informant purchased a drink there on this date; that affiant and agent H. P. Brown have watched said premises and on one occasion saw two parties coming away from said premises under the influence of liquor."

The foregoing excerpt in quotations is the only statement of facts to be found in the affidavit upon which the search-warrant was issued, and the only statement of alleged facts to be found any place in the record, or elsewhere, that was made before the Commissioner who issued the affidavit. The only statement contained in the affidavit of any fact

within the actual knowledge of the party making it is, "that affiant and agent H. P. Brown have watched said premises and on one occasion saw two parties coming away from said premises under the influence of liquor."

The other portion of the affidavit is the rankest hearsay. In the last quoted paragraph of the affidavit there is no fact alleged except that at sometime (how remote we do not know) and on one occasion, Nash and Brown saw two parties coming from the premises under the influence of liquor. No allegation or statement as to their condition when they entered, or that they saw them enter, or as to the identity of the persons under the influence of liquor.

Let us test the sufficiency of this affidavit by the provisions of Sec. 19 of the Act of June 5th, 1917, commonly called "Espionage Act". Sec. 19 provides that any person making a false affidavit for the purpose of securing the search-warrant shall be punished, as provided in Section 125-126 of the Criminal Code of the United States. Section 125-126 of the Criminal Code provide for the prosecution and punishment of anyone committing perjury. The sufficiency of the affidavit being tested under this Section, it becomes at once apparent that no successful prosecution would follow for the making of an affidavit of this character, however ill-founded or for whatever malicious purpose it might have been made.

There is no date given so as to fix the time when

Nash claims to have seen the two persons come from the premises in an intoxicated condition; there is no description of the two persons given to identify them as either male or female, or their nationality; there is no name given by which they could be identified. It necessarily follows that no successful prosecution for perjury could be maintained. The sufficiency of the affidavit must be established by its contents, and not by what is found upon a search.

Supposing that a search-warrant be issued upon such a affidavit and a person's premises or property searched, and the officers failed to find any liquor or other evidences that the National Prohibition Law has been violated? What redress would the person who had suffered the disgrace of such a search have? The National Prohibition Enforcement Officers are not under bond, consequently, an action for malicious trespassing would avail nothing. They have alleged no fact in the affidavit, consequently, an action or prosecution for perjury would fail. If such an affidavit be held sufficient, then all our citizens and their property may be searched with impunity, and the safety and protection of the people at large as guaranteed and provided in the Fourth Amendment to the Constitution of the United States, be destroyed; which Amendment provides "The right of the people to be secure in their persons, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and

particularly describing the place to be searched and the persons or things to be seized."

If such an affidavit be held sufficient the Act of June 5th, 1917, commonly called the "Espionage Act", providing for the manner and circumstances under which a search-warrant may be issued, and what the affidavit shall contain, becomes a dead letter. Section III of said Act, in substance says:

"That no search-warrant shall be issued but upon probable cause supported by an affidavit naming or describing the person, and particularly describing the property and place to be searched."

Section IV of said Act is in substance:

"That the magistrate must, before issuing the search-warrant, examine on oath the complainant and any witnesses he may produce."

Section V of said Act is in substance:

"The depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

Section XIX of the said Act provides in substance:

"That any person making a false affidavit for the purpose of securing the search-warrant shall be punished, as provided in Section 125-126 of the Criminal Code of the United States."

Upon this point we quote from the opinion in the case of Veeder v. U. S. 252d Fed. page 414, decided by the Circuit Court of Appeals for the Seventh Circuit, on page 418:

"A brief statement of the applicable principles of law will suffice, for they are so well settled, so obvious from a reading of the constitutional and statutory provisions in question, so founded in the instructive sense of natural justice, that no elaboration of the grounds therefore is needed.

"One's person and property must be entitled, in an orderly democracy, to protection against both mob hysteria and the oppression of agents whom the people have chosen to represent them in the administration of laws which are required by the Constitution to operate upon all persons alike.

"One's home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he is armed with a search-warrant.

"No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises—but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law.

"The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser."

The principles stated in the foregoing opinion have been repeatedly announced by the Courts of the United States and of the Supreme Courts of the several states, both before and since, the opinion in the case of Veeder v. U. S. supra was handed down.

Boyd v. U. S. 116th U. S. 616, 29th L. Ed. 746;
Weeks v. U. S. 232d U. S. 383, 58th L. Ed. 632;
Gouled v. U. S. Supreme Court Advance Opinions, April 1st, 1921, page 311, also published in the 65th L. Ed.
Lawrence Amos v. U. S.—U. S. Supreme Court Advance Sheets, April 1st, 1921, page 316, also published in 65th L. Ed.
Holmes v. U. S. 275th Fed. 49;
Roy Youman, v. Commonwealth of Kentucky, 13th A.L.R. page 1303, also found in 224th Southwestern, page 860;
State of Wyoming v. Theo. Peterson, 13th A.L.R. page 1284;
People v. August Marxhausen, 3d A.L.R., page 1505;
In Re: Rule of Court, Fed. Cases No. 12,126;
U. S. v. Frieburg, 233d Feb. 313;
In Re: Tri-State Coal Company, 253d Fed. page 605;
U. S. v. Baumert, 179th Fed. 735;
Beavers v. Hinkle, 194th U. S. 73; (48th L. Ed 82)
U. S. v. Tureand, 20th Fed. 621;
Ex Parte Rhodes, 1st A.L.R. 568;
People v. Glennon, 74th N. Y. Supplement, 794;
State v. Gleason, 4th Pac. 363;
In Re: Kellam, 41st Pac. 960.

Assignment No. 11: Based upon the objection to the introduction of any testimony arose as follows, after the jury had been selected, impaneled, and sworn to try the case. See Transcript of Record Upon Writ of Error, page 52:

"Mr. DISKIN: We waive our opening statement, and call Mr. Brown.

"Mr. MOORE: If the Court please, at this time I object to the introduction of any testimony on the part of any witness as to what was done and what was found or seized in the premises occupied by this defendant in Reno, and as described in the affidavit and in the search-warrant, which are a part of the records in this case, on the grounds that the evidence, and all the evidence on the part of the Government, was secured by reason of an illegal and unlawful search of the defendant's premises, and of his property; that there was no valid or sufficient affidavit filed with the magistrate, or commissioner who issued the search-warrant in question, or showing that probable cause existed that any crime had been, and was being committed, and that the evidence in the possession of the Government in this case was secured in violation of the constitutional rights of this defendant, as provided in the Fourth Amendment to the Constitution of the United States; and that its admission in testimony here will be in violation of the Fifth Amendment to the Constitution of the United States.

"I base this upon the motion in the case, and the proceedings heretofore had. I understand the Court has ruled on that."

It was maintained by the Court and counsel for

the Government at the trial that, inasmuch as the Court had denied the Motion to Quash the search-warrant and return the property and to suppress and exclude the testimony, such action was determinative of the objection to the introduction of testimony. We maintained there, and we urge here, that an objection to the introduction of evidence secured by the Government in an unlawful manner, and in violation of the Constitutional rights of the defendant, may be successfully interposed at the trial. Cases cited at the close of this subdivision of our Brief are decisive upon this question.

In connection with the question raised in Assignment No. II, and decided under the same authorities hereinbefore referred to, Assignment No. III, which was based upon the objection to the admission of the testimony of H. P. Brown; and Assignment No. IV, which was based upon the objection of the testimony of Nash; and Assignment No. VI, which was based upon the motion to strike the testimony of Brown and Nash from the record; and Assignment No. VII, based upon the objection to the introduction of the testimony of S. C. Dinsmore, may all be considered and determined.

In the case of Gouled v. U. S. published in Supreme Court Advance Opinions, April 1st, 1921, page 311, certain question were presented to the Supreme Court. The sixth question is as follows:

"If papers of evidential value only be seized un-

der a search-warrant, and the party from whose house or office they are taken be indicted,—if he then move before trial for the return of said papers, and said motion is denied,—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?"

The Court says:

"It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

The law as enunciated in the Gouled case, is not limited to the introduction of papers in evidence alone, but extends to the introduction of any matter in evidence, either by way of oral testimony or exhibits that were secured by the Government in an unconstitutional manner.

Weeks v. U. S. 232d U. S. 383; 58th L. Ed. 632;
Gouled v. U. S. supra.
Lawrence Amos v. U. S.-U. S. Supreme Court Advance Sheets, April 1st, 1921, page 316, also published in 65th L. Ed.
Holmes v. U. S. 275th Fed. 49;
Roy Youman v. Commonwealth of Kentucky, 13th A. L. R. page 1303; also found in the 224th Southwestern, page 860;
State of Wyoming v. Theo. Peterson, 13th A. L. R. page 1284.

Assignment No. VI, based upon the motion to strike the testimony of Nash and Brown from the Record, there is another question raised than that heretofore presented. That question is, "Was the search-warrant itself a legal search-warrant?" Copy of the search-warrant will be found on page 13 and 14, Transcript of Record Upon Writ of Error.

It is the contention of the plaintiff in error that the search-warrant is particularly deficient for two reasons:

First: That there is no finding of probable cause made by the Commissioner contained in the search-warrant. For this reason the search-warrant itself conferred no authority upon the officers to make the search. Before a commissioner or magistrate can legally issue a search-warrant it is necessary that the magistrate judicially determine that probable cause exists for the issuance of the search-warrant, and such finding of probable cause is similar to the finding and statement of probable cause in a warrant of commitment, or other war-

rant; and in such warrants it is necessary that a finding of probable cause be made.

In Re: Van Campen, Fed. Case No. 16,835;
U. S. v. Brawner, 7th Fed. Rep. page 86;
Ripper v. U. S. 178th Fed. 224; Circuit Court of Appeals, 8th District;
De Graff v. the State, 103 Pac. 538;
Miller v. U. S. 57th Pac. 836;

In the last two cited cases the Oklahoma Court cites the case of Ex Parte Burford, 3d Cranch, 448; 2d L. Ed. 495, and quotes from the opinion by Chief Justice Marshall in the last two mentioned cases, upon the sufficiency of the warrant, as follows:

> "It (the warrant) does not allege that witnesses were examined in his (defendant's) presence, or any other matter whatever which can be the ground of their order to find sureties. If the charge against him was malicious, or grounded on perjury, whom could he sue for malicious prosecution, or whom could he indict for perjury? There ought to have been a conviction of his being a person of ill fame. The fact ought to have been established by testimony. The warrant of commitment was illegal for want of some good cause certain, supported by oath."

The prisoner was discharged on those grounds alone. The same last two mentioned cases refer to In Re: Rule of Court, Fed. Case No. 12,126, and quotes therefrom, as follows:

> "An affidavit made solely upon information derived from others whose names are not given by a person who swears that he has good reason to

believe, and does believe that a certain person, naming him, has committed an offense against the law, describing it, does not meet the requirements of Article IV of the Amendments to the Constitution of the United States. The probable cause mentioned in that Article, which is supported by oath or affirmation, and upon which alone a warrant can issue, must be submitted to the committing magistrate, who must judge of the sufficiency of the ground shown for believing the accused party guilty. The magistrate, before issuing a warrant, should have before him the oath of the real accuser to the facts on which the charge is based, and on which the belief or suspicion of guilt is founded."

Second: The search-warrant was invalid for the reason that no direction or instruction contained therein authorizing and directing the officer serving the same to either arrest the person in possession of the premises or of the property sought to be seized, and that there was no dirction that the property be brought before the Commissioner.

White v. Wagner, 50th L.R.A., page 60, and other cases hereinbefore cited.

Assignment No. VIII: "That the Court erred in overruling defendant's motion made in said cause, in which defendant renewed the motion made before Anna M. Warren, the Commissioner, to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren on the 9th day of April, A. D. 1921," raises the question as to whether or not the District Court has the right or will review any pro-

ceedings before the Commissioner; that the trial court has the power to review the acts of the Commissioner, we think, is determined by the following authorities:

Brawner v. U. S., 7th Fed. page 86;
Ex Parte Ballman, 8th U. S., pages 75, 114;
In Re: Martin, Fed. Cases, No. 9,151;
U. S. v. Shepherd, Fed. Cases No. 16,273;
In Re: Buford, Fed Cases, 2,148;
Foster's Fed. Practice, Vol. 2, Sec. 488, page 1623.

III.

Assignment of Error IX, aside from the question hereinbefore discussed, raises the question of the legality of the search, even presuming that a valid search warrant was in possession of the officers. It is based upon the motion made in this case in the District Court to quash the search-warrant, for the return of the property, and the suppression of the evidence. This motion (see Transcript of Record Upon Writ of Error, page 8) was supported by the affidavit of Geo. H. Bachenberg, the defendant. Transcript of Record Upon Writ of Error, page 10, in which affidavit was set out the manner of the search from which affidavit it appears that the defendant was in his place of business, and that the officers rushed in, leaped over the counter, or front bar, and overpowered the defendant, and completed their search of that portion of the premises and their seizure of the liquors in question in a forcible

and riotous manner. While they were in possession of a search-warrant (which we contend was invalid and insufficient for the reasons hereinbefore stated) yet they conducted their search in a manner not warranted by the search-warrant, and as though they were not in possession of one. We earnestly contend that it is the duty of officers of the law in the execution of a valid search-warrant to proceed in an orderly manner, and to do as little damage to the property being searched as possible and to treat the party in possession with due and proper consideration. It is their duty to make known to the party in possession of the premises that they are officers of the law in possession of valid authority for the search of his property or the seizure thereof, or the seizure of his person. Then, if resistance be made, they are justified in using force, but not otherwise. This position we maintain is supported by the long line of authorities hereinbefore cited in this Brief.

In view of the questions raised herein upon the Writ of Error and upon the authorities herein cited, the plaintiff in error should prevail and the cause be remanded to the District Court with directions to quash the search-warrant and to exclude and suppress all testimony secured thereby, and the action be dismissed.

Respectfully submitted,

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